Filed 7/3/19 Thomas v. County of San Joaquin CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

WILLIAM C. THOMAS, Plaintiff and Appellant, v. COUNTY OF SAN JOAQUIN, Defendant and Respondent.	C081970 (Super. Ct. Nos. 39201500324565CUWMSTK, STKCVUWM20150003835)

William C. Thomas, a Sheriff Sergeant for the San Joaquin County Sheriff's Office (Department), sues for back pay and benefits from San Joaquin County (County) for a period of time during which he did not work while the county board of retirement considered his application for disability retirement under the County Employees Retirement Law (CERL). (Gov. Code, §§ 31450, 31720 et seq.; unless otherwise stated, statutory section references that follow are to this Code.) Thomas returned to work after

the board denied his application. Thomas claims entitlement to back pay and benefits under section 31725, which provides that if an employer "dismisses" the employee for disability, and the retirement board denies disability retirement on the ground that the employee is not incapacitated for the performance of his duties, the employer shall not only reinstate the employee but also pay back pay and benefits. The trial court sustained the County's demurrer to Thomas's first amended petition for writ of mandate without leave to amend, because he was not "dismissed." Thomas appeals. We affirm the judgment (order).

FACTS AND LEGAL PROCEEDINGS

As alleged in the first amended writ petition, Thomas began working as a deputy sheriff for the Department in 1987 and was promoted to sergeant in 2008. He started having low back pain in 2009.

In March 2011, he injured his back at work while bending over to pick up an equipment bag. He filed a worker's compensation claim and began receiving workers' compensation (Lab. Code, § 4850) during his rehabilitation and absence from work.

On December 15, 2011, the Agreed Medical Examiner, Dr. Abelow, issued a report opining that Thomas was permanently precluded from returning to the customary and usual job as a patrol sergeant.

On January 26, 2012, Thomas filed an application for service-connected disability retirement with the San Joaquin County Employees Retirement Association (SJCERA).

On February 8, 2012, Thomas and County met to review his permanent work restrictions. County advised him that his permanent work restrictions could not be accommodated. Thomas's pleading incorporated by reference his attached declaration and an attached exhibit -- the County's February 9, 2012, letter to Thomas documenting that, in the meeting, they discussed several options, including participation in a job search with no guarantee of placement (which Thomas rejected), applying for disability

retirement (which Thomas had already initiated) or other civil service retirement, and using his accruals while he was on leave of absence. The letter noted the County could not give an indefinite leave of absence, and so he should maintain communication with his department to keep them apprised of his status, and the County remained willing to help with a job search if he changed his mind.

Thomas's worker's compensation payments ended on March 7, 2012. Thomas asked the Department if he could work light duty while awaiting decision on his retirement application. The Department advised him he would not be offered a temporary modified assignment because his work restrictions were permanent. Thomas started using his leave balances.

On June 15, 2012, Dr. Abelow issued a supplemental report that Thomas could do modified work if it did not involve lifting more than 40 pounds on a regular basis, repetitive bending, stooping, kneeling, pushing, pulling, climbing, or involvement in altercations wearing a duty belt. Tristar Risk Management asked County to evaluate whether there was any permanent modified work for Thomas.

In August 2012, County advised it did not have any permanent modified or alternative work for Thomas as a sheriff sergeant or as a public safety officer.

The pleading alleges that the Department does not offer temporary or permanent modified assignments for public safety positions when the employee has permanent work restrictions that prevent the employee from returning to his normal position as a public safety officer, and if such employee requested a light duty assignment while waiting for a retirement board decision, the Department would deny the request.

Thomas exhausted his sick leave in July 2012 and began using vacation leave. In September 2012, his vacation utilization was reduced to 4.1 hours per day, reducing his pay. He exhausted his vacation balance on November 30, 2012, and was placed on "unpaid status" (as alleged in the pleading).

From December 2012 through April 2014, County advanced Thomas payments for service-connected disability retirement pending the board's decision, pursuant to Labor Code section 4850.4.

On May 9, 2014, after an administrative hearing, SJCERA denied Thomas's application for service-connected disability retirement. Thomas does not allege or submit any exhibit explaining the reason for the denial.

On May 29, 2014, Thomas was allowed to return to his unmodified position as sheriff sergeant. The County denied applicability of section 31725 (which would require reinstatement and back pay if the County had dismissed Thomas for disability).

On July 11, 2014, County demanded that Thomas repay the disability retirement advances he had received under Labor Code section 4850.4. (Lab. Code, § 4850.4, subd. (f) ["After final adjudication, if an employee's disability application is denied, the local agency and the employee shall arrange for the employee to repay any advanced disability pension payments received by the employee . . . ."].)

Thomas demanded that County pay him back pay and benefits from December 1, 2012 (when he exhausted his vacation balance) through May 30, 2014, pursuant to section 31725. In August 2014, County responded he was not entitled to back pay or benefits under section 31725, because he was never "dismissed" for disability or for any other reason.

The pleading alleges Thomas filed a claim for compensation with County pursuant to section 910 and had not been advised of a decision, but on appeal Thomas makes no contention on this point.

County demurred to Thomas's first amended writ petition on the sole ground that Thomas was not "dismissed from employment for disability." The trial court sustained the demurrer without leave to amend, concluding section 31725 was inapplicable because Thomas was not dismissed.

DISCUSSION

I

Appealability

Thomas purports to appeal from a judgment or appealable order. But the record contains only "NOTICE OF ENTRY OF JUDGMENT OR ORDER," referencing an "ORDER SUSTAINING RESPONDENT'S DEMURRER TO FIRST AMENDED VERIFIED PETITION FOR WRIT OF MANDATE WITHOUT LEAVE TO AMEND." The order merely ordered that the court's tentative ruling (to sustain the demurrer without leave to amend) became the ruling of the court, and the demurrer was sustained without leave to amend.

"An order sustaining a demurrer without leave to amend is not appealable, and an appeal is proper only after entry of a dismissal on such an order. [Citations.] On occasion, however, appellate courts have reviewed such orders, based upon justifications such as the avoidance of delay, the interests of justice, and the apparent intent of the trial court to have a formal judgment filed. (*Reyna v. City and County of San Francisco* (1977) 69 Cal.App.3d 876, 879.) And when the trial court has sustained a demurrer to all of the complaint's causes of action, appellate courts may deem the order to incorporate a judgment of dismissal, since all that is left to make the order appealable is the formality of the entry of a dismissal order or judgment. (*Thaler v. Household Finance Corp.* (2000) 80 Cal.App.4th 1093, 1098; see also *Hinman v. Department of Personnel Admin.* (1985) 167 Cal.App.3d 516, 520 [appeal from order sustaining demurrer without leave to amend deemed proper to avoid delay and in furtherance of justice].)" (*Sisemore v. Master Financial, Inc*. (2007) 151 Cal.App.4th 1386, 1396.)

Where we have reviewed orders sustaining demurrers, we have deemed the order to incorporate a judgment of dismissal and modified the order to add a paragraph

dismissing the action. (*Hinman, supra*, 167 Cal.App.3d at p. 520; *California State Employees' Assn. v. State of California* (1973) 32 Cal.App.3d 103, 106, fn. 1.)

We will review the order.

II

Standard of Review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, . . . [t]he reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. . . .' However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

III

Section 31725

Thomas argues County's denial of his disability retirement application required County to reinstate him with back wages and benefits for the period of his "effective dismissal." We conclude the statute does not apply because Thomas was not dismissed.

Section 31725 provides: "Permanent incapacity for the performance of duty shall in all cases be determined by the board [county board of retirement per § 31459, subd. (c)]. If the medical examination and other available information do not show to the satisfaction of the board that the member is incapacitated physically or mentally for the

performance of his duties in the service and the member's application is denied on this ground the board shall give notice of such denial to the employer. The employer may obtain judicial review of such action of the board by filing a petition for a writ of mandate in accordance with the Code of Civil Procedure or by joining or intervening in such action filed by the member within 30 days of the mailing of such notice. If such petition is not filed or the court enters judgment denying the writ, whether on the petition of the employer or the member, and the employer has dismissed the member for disability the employer shall reinstate the member to his employment effective as of the day following the effective date of the dismissal."

If this statute applies, the employer must also pay the member wages and benefits he would have accrued during the period of the member's dismissal. (*Stephens v. County of Tulare* (2006) 38 Cal.4th 793, 801 (*Stephens*).)

Although the pleading does not allege that the reason for denial of the retirement application was that the board was not satisfied that Thomas was incapacitated for the job, County does not raise this as an alternative ground for inapplicability of section 31725, and we will assume for purposes of this appeal that the board concluded Thomas was no longer incapacitated for the job (to which he has been reinstated).

The issue is whether Thomas was "dismissed for disability" as stated in the statute.

Thomas argues he was "effectively dismissed from his employment" on December 1, 2012, after he exhausted his leave balances and stopped receiving wages and benefits. We disagree.

"[A] dismissal as contemplated by section 31725 requires an employer action that results in severance of the employment relationship. An employee who is neither sent away nor removed, but voluntarily absents himself or herself from the job, without more, cannot validly claim he or she was 'dismissed' by the employer." (*Stephens, supra,* 38 Cal.4th at p. 802.)

"Nor is a dismissal established merely by the fact that [the employee] was taken off the regular payroll. . . . [T]he term 'dismissed' does not simply mean the absence of a salary. A person could be on unpaid leave, perhaps as a reasonable accommodation under the Fair Employment and Housing Act for a significant period of time, but that alone is not sufficient to find a termination." (*Kelly v. County of Los Angeles* (2006) 141 Cal.App.4th 910, 924, citing *Stephens*.)

In *Stephens, supra*, the employer, upon learning that the employee was reinjuring his thumb even in a modified light duty assignment, told the employee in a letter to leave work and take sick leave until his medical condition improved to the point where he could return without concern for reinjury. (*Id*., 38 Cal.4th at pp. 805-806.) Section 31725 did not apply because the employer thus presupposed the employee had the ability to return in the future, and by using sick leave the employee did not face the financial dilemma the Legislature intended to address in section 31725 -- that disputes between counties and retirement boards leave an employee in limbo with neither employment nor disability income. (*Stephens,* at pp. 805-806.) The Legislature solved the problem by giving the retirement board the final word and requiring reinstatement if the board found the employee was not disabled, while giving local governments the right to take a judicial appeal of the board's decision. (*Id*. at p. 805.) The Legislature ensured that county employees dismissed for disability would have either employment or disability income and not be left destitute. (*Ibid*.) Nothing in the legislative history suggested that the statute applied to employees who are not actually dismissed from their jobs or employees who choose voluntarily to leave the county's employ. (*Ibid*.) "Neither type of employee faces the dilemma of losing a job due to a disability whose existence the board of retirement declines to acknowledge." (*Ibid*.)

The Supreme Court rejected the employee's argument that the letter effectively dismissed him. (*Stephens, supra,* 38 Cal.4th at p. 806.) "[A]lthough we agree a

qualifying dismissal within the meaning of section 31725 need not be accompanied by any particular formality, some form of a termination is nevertheless required." (*Ibid*.)

Kelly, *supra*, 141 Cal.App.4th 910, applying *Stephens* to a different factual setting, held that an employee was *not* "dismissed" within the meaning of section 31725, when her employer (1) advised her it currently had no available position to accommodate her work restrictions imposed following her industrial injury; (2) placed the employee on *unpaid* industrial-injury leave, but (3) offered the employee vocational rehabilitation (including a maintenance allowance) to train for another position. (*Id*. at p. 913.)

Mooney v. County of Orange (2013) 212 Cal.App.4th 865 (*Mooney*) held the employee was not "dismissed" within the meaning of section 31725, where she was physically unable to perform the duties of the job because of permanent work restrictions, was on disability leave, and the County continued to explore alternate employment for her (she rejected two offers as demotions), and she did not look for another job, and did not file for or receive unemployment insurance benefits (thus supporting that she did not consider herself terminated). (*Id*. at p. 870.) The employer also engaged in an interactive process for her claim of disability discrimination (*id*. at p. 877) -- a factor not present in our case.

Here, Thomas did not lose a job due to a disability whose existence the retirement board declined to acknowledge. The employer never severed the employment relationship. Rather, as alleged in Thomas's pleading, he was on "unpaid status" after his worker's compensation benefits, sick leave, and vacation leave, expired. Though he was on unpaid status, he received advanced disability pension payments under Labor Code section 4850.4, which requires the County to make such advances to an employee as long as the employee cooperates with the evaluation process for retirement. (Lab. Code, § 4850.4, subds. (a), (b), (d).) The County did not dismiss Thomas.

Thomas argues *Stephens* and *Kelly* are distinguishable because the medical restrictions there were *temporary* and/or were able to be accommodated with a modified

duty position, whereas Thomas's pleading alleges the Department does not offer modified assignments for an employee with permanent restrictions.

However, these distinctions do not undercut *Stephens*'s holding that "a dismissal as contemplated by section 31725 requires an employer action that results in severance of the employment relationship." (*Id*., *supra,* 38 Cal.4th at p. 802.)

And, although the employer's letter in *Kelly*, which she did not view as a dismissal, referred to "temporary" restrictions, her physician's report stated her condition had become both permanent and stationary. (*Id*., *supra,* 141 Cal.App.4th at p. 914 & fn. 3.) *Kelly* suggested it might have found a dismissal if the employer had viewed the work restrictions as permanent and told the employee it was unable to accommodate the permanent restrictions and left it at that, without any indication of alternative employment. (*Id*. at p. 924.) But that was not what happened. (*Ibid*.) To the extent she lacked employment-related income after her vocational rehabilitation allowance stopped, that was the product of her inaction, rather than the result of a termination. (*Id*. at p. 926.) Had she requested placement in an alternative position and been denied, it would have been reasonable to conclude she was functionally dismissed at that point. (*Ibid*.)

Here, even though Thomas's condition was considered to be permanent (which apparently ended up not being the case), the employer was willing to help Thomas find alternative employment and expressly kept that offer open after Thomas declined. He asserts any such alternative would have been a demotion and may have jeopardized his retirement application. But, even assuming he is right, that does not undermine the fact that the County was not severing the employment relationship.

Thomas cites three cases as support that he was "dismissed for disability" -- *Tapia v. County of San Bernardino* (1994) 29 Cal.App.4th 375; *Phillips v. County of Fresno* (1990) 225 Cal.App.3d 1240; and *Leili v. County of Los Angeles* (1983) 148 Cal.App.3d 985. However, all three cases predated the California Supreme Court's decision in *Stephens* in 2006, which agreed with the earlier cases to the extent they stood for the

proposition that "dismissal" need not be accompanied by any particular formality, but held that "some form of a termination is nevertheless required." (*Stephens, supra*, 38 Cal.4th at p. 806; *Mooney, supra*, 212 Cal.App.4th at p. 877.)

Stephens noted that the *Leili* court did not actually address the meaning of the word "dismissed" in section 31725, but rather *assumed* the employee had been dismissed. (*Stephens, supra*, 38 Cal.4th at p. 807.)

Stephens noted the limited applicability of *Phillips*, where the "dismissal" was the employer's refusal to reinstate the employee *after* the county retirement board denied his application for disability retirement. (*Stephens, supra*, 38 Cal.4th at p. 808; *Phillips, supra*, 225 Cal.App.3d at pp. 1245, 1255-1258.) "In affirming the trial court's ruling, the *Phillips* court signified it agreed the employee was entitled to reinstatement *as of the date he sought reinstatement*, as the trial court held, not as of the date he voluntarily took a medical leave without pay. . . . It was when the county denied Phillips's request to return to his job that it acted in a way that severed the employment relationship." (*Stephens*, at p. 808, orig. italics.)

Thus, *Phillips* does not apply here. *Phillips* dealt with an employer's obligation to provide back pay and benefits after it refused to return the employee to work, *after* the retirement board had denied his disability application. Thomas's situation is entirely different, dealing with the time periods before and after he had applied for disability retirement -- but before the retirement board denied his application.

Tapia, supra, 29 Cal.App.4th 375, concluded a deputy sheriff was "dismissed" on the date when the county's occupational health service found she was not medically qualified for regular duty, coupled with the fact that the sheriff did not then approve her for light duty. (*Id*. at p. 382.) However, the county's sole contention about "dismissal" was that "dismissal" occurs only when an employer refuses to return an employee to work *after* the retirement board's decision becomes final, and there was no such refusal, and Tapia did return to work after the board denied her retirement application. (*Id*. at

pp. 381-382.) The appellate court, in rejecting the employer's contention, relied on the pre-*Stephens* cases of *Leili* and *Phillips*. Regarding *Leili*, the *Tapia* court merely said that *Leili* held that if an employee who *has* been terminated is *later* found by the board not to be disabled, he must be reinstated. (*Tapia*, at p. 382.) Regarding *Phillips*, the *Tapia* court merely cited *Phillips's* observation that the purpose of section 31725 is to eliminate severe financial consequences to an employee resulting from *inconsistent decisions* between the employer and the board which leave the employee without retirement income and without income from a job. (*Tapia*, at p. 382.) *Tapia* deduced the crucial factor was the inconsistency, rather than the sequence, of the decisions by the employer and the board. (*Ibid*.)

Here, Thomas thinks *Tapia* supports his argument that he was effectively dismissed on December 1, 2012, when he exhausted his pay and benefits, but the County took the position that modified or alternate work was not available based on the doctor's report in the worker's compensation case. Thomas quotes *Tapia*'s comment that dismissal occurred when the county's occupational health service found she was not medically qualified for regular duty, and the sheriff did not approve her for light duty.

Given the limited scope of argument in *Tapia*, and the fact that it predated the Supreme Court's clarification in *Stephens* of the meaning of "dismissal" in section 31725, we reject Thomas's position.

DISPOSITION

We deem the order sustaining defendant/respondent's demurrer without leave to amend to incorporate a judgment of dismissal. Thus, the ruling and order sustaining the demurrer is modified by adding language dismissing the action.

The judgment (order) is affirmed. Respondent shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

HULL, J.

We concur:

BLEASE, Acting P. J.

MAURO, J.